



Paper No. 4

**COPY MAILED**

APR 14 2003

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Schurz, NV 89427

In re Application of : **OFFICE OF PETITIONS**  
Reymus : **DECISION ON PETITION**  
Application No. 10/067,666 :  
Filed: February 4, 2002 :  
For: FASCIA BOARD HANGER :

This is a decision on the petition under 37 CFR 1.137(a), filed January 30, 2003, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned June 3, 2002 for failure to file a proper response to the Notice to File Missing Parts of Nonprovisional Application ("Notice") mailed April 2, 2003. The Notice set a two (2) month shortened statutory period of time for reply. No extensions of time in accordance with 37 CFR 1.136(a) were requested. This decision precedes mailing of Notice of Abandonment.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

Petitioner has failed to satisfy items (1) and (3) set forth above.

As to item (1), the petition lacks the required reply. The filing fees submitted with the instant application upon filing were insufficient. The Notice required applicant to submit the remaining required filing fees as well as fees due for independent claims in excess of 3. The Notice required applicant to submit \$15.00 to complete the basic small entity filing fee

and \$420.00 for independent claims in excess of 3. Petitioner is advised that since the mail date of the Notice, filing fees have increased. As of today, the basic small entity filing fee is \$375.00 and independent claims over 3 are currently \$42.00 per claim. The instant application contains 10 independent claims over 3 for a total due of \$420.00. Applicant originally submitted \$355.00. Accordingly, the fees required for revival of the instant application are currently \$440.00 (\$20.00 towards basic filing fee and \$420.00 for independent claims). Any renewed petition must be accompanied by a proper response to the Notice to File Missing Parts of Nonprovisional Application.

As to item (3) set forth above, petitioner has failed to present a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 217 U.S. App. D.C. 27, 671 F.2d 533 at 538, 213 U.S.P.Q. (BNA) 977 at 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 U.S.P.Q. 2d 1130 (N.D. Ind. 1987).

The showing of record is insufficient to establish unavoidable delay. Petitioner attributes the delay in timely responding to the Notice to an ongoing medical condition. Petitioner declares that after being diagnosed with colon cancer in February, 2002, petitioner began medical treatment in March, 2002. Petitioner further declares petitioner underwent surgery on July 15, 2002 and continues to undergo chemotherapy treatments.

Petitioner has failed to provide documentary evidence to establish that he was incapacitated for the entire period of time

from the time a response to the Notice was due until the filing of a grantable petition pursuant to 37 CFR 1.137(a)(3). The instant petition lacks supporting evidence in the form of medical records and/or reports to support petitioner's contention that medical illness prevented petitioner from timely attending to the instant application for patent. Moreover, to the extent that petitioner was incapacitated, petitioner has failed to establish that an illness of this nature would have precluded petitioner from timely scheduling and preparing the necessary response to the Notice. Hence, no nexus has been established between the alleged medical condition of petitioner and the failure to timely file a proper response to the Notice. See, In re Patent No. 4,461,759, 16 U.S.P.Q.2d (BNA) 1883 (Comm'r Pat. & Trademarks Aug. 10, 1990).

Any renewed petition must be accompanied by evidence to establish unavoidable delay within the meaning of 37 CFR 1.137(a) and should include evidence to substantiate the medical history described in petitioner's declaration. The renewed petition must establish a nexus between the alleged ongoing medical condition of petitioner and petitioner's failure to timely submit a proper reply to the Notice. Petitioner should consider acquiring and submitting declarations and/or affidavits from medical professionals familiar with petitioner's recent medical history along with copies of medical records and/or reports. Moreover, petitioner is reminded that the entire period of delay in responding to the Notice from the time that a response was due on June 2, 2002 until such time as a grantable petition is filed must be proven to have been unavoidable.

#### **ALTERNATE VENUE**

Petitioner is strongly urged to consider filing a petition stating that the entire delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee (currently \$650.00 for a small entity), statement of unintentional delay, reply, and, if applicable, a terminal disclaimer (and fee).

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to

revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Enclosed for petitioner's convenience is a form for use in this matter.

Further correspondence with respect to this matter submitted **prior to** May 1, 2003 should be addressed as follows:

By mail:           Commissioner for Patents  
                    Box DAC  
                    Washington, DC 20231

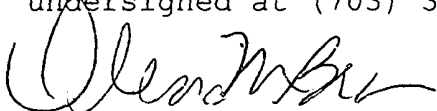
By facsimile:   (703) 308-6916

By hand:           Office of Petitions  
                    2201 South Clark Place  
                    Crystal Plaza 4, Suite 3C23  
                    Arlington, VA 22202

For correspondence submitted on or after May 1, 2003, petitioner is **advised** to review the attached Special Mail Stop Notice detailing changes in the USPTO correspondence.

The correspondence address contained in the instant petition differs from the address of record in this application. If petitioner desires to receive future correspondence at an address other than that currently of record, the appropriate change of correspondence address request must be promptly submitted. A courtesy copy of this decision will be mailed to both addresses. However, all future correspondence will be directed to the address of record until such time as appropriate instructions are received to the contrary. Petitioner is **strongly urged** to complete the attached change of correspondence address form and return the same as soon as possible or petitioner should submit the change of correspondence address along with a renewed petition.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 305-0310.



Alesia M. Brown  
Petitions Attorney  
Office of Petitions  
Office of the Deputy Commissioner

for Patent Examination Policy

Enclosures: USPTO Privacy Statement  
Mail Stop Notice  
PTO/SB/64  
PTO/SB/144

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